

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	MB Docket No. 05-144
FM Broadcast Stations.)	RM-11189
(Dalhart and Perryton, Texas))	
)	
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)	

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: February 28, 2007

Released: March 2, 2007

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it: (1) a *Notice of Proposed Rule Making and Order to Show Cause*¹ issued in response to a rulemaking petition filed by Radio Dalhart ("Petitioner"), the licensee of Station KXIT-FM, Channel 242C1, Dalhart, Texas; (2) supporting comments filed by the Petitioner; (3) an opposition filed by Perryton Radio, Inc. ("Perryton Radio"), the licensee of Station KEYE-FM, Perryton, Texas; (4) a reply filed by the Petitioner; and (5) various related pleadings.² For the reasons discussed below, we grant the Petitioner's rulemaking petition.

2. **Background.** At the request of the Petitioner, the *NPRM/OSC* proposed the substitution of Channel 241C1 for Channel 242C1 at Dalhart and the modification of the license for Station KXIT-FM to specify operation on Channel 241C1. To accommodate this channel change, the *NPRM/OSC* proposed the substitution of Channel 248C3 for Channel 241C3 at Perryton, Texas, and the modification of the license for Station KEYE-FM to specify operation on Channel 248C3 in lieu of Channel 241C3. Although the Petitioner contended that there will be no loss of service caused by the proposed channel change at Dalhart, a staff engineering analysis revealed that there will be a loss of service to 255 persons within 1,748 square kilometers, who will be reduced from two to one aural service, thereby creating a "gray" area.³ The staff engineering analysis further showed that there will be a gain of service to 14,160

¹ *Dalhart and Perryton, TX*, Notice of Proposed Rule Making and Order to Show Cause, 20 FCC Rcd 6197 (MB 2005) ("*NPRM/OSC*").

² After the pleading cycle ended, the following pleadings were filed: (1) a motion for temporary stay of proceedings filed by Perryton Radio; (2) an opposition to motion for temporary stay of proceedings filed by the Petitioner; (3) a preliminary response and motion for additional time filed by Perryton Radio; (4) a further comment filed by Perryton Radio on January 12, 2006; (5) a response to a staff request for additional information filed by the Petitioner on January 24, 2007; and (6) a reply filed by Radio Perryton on February 6, 2007. In order to resolve this case on a complete record, we will consider all of the pleadings that have been filed. As a result, Perryton Radio's motion for a temporary stay of proceedings is moot.

³ A "gray area" is an area in which there is only one full-time aural reception service; a "white area" is an area in which there are no full-time aural reception services. See *Cheyenne, Wyoming, and Gerring, Nebraska*, 15 FCC Rcd 7528, 7530 (MB 2000).

persons, for a net gain of service to 13,905 people, and that 98 persons currently within a “gray” area will receive a second aural service. The *NPRM/OSC* solicited comment on the impact that the creation of “gray” area within the loss area, as well as the service to the “gray” area within the gain area, have on this proposal and whether the numbers within these “gray” areas are *de minimis*.⁴ The *NPRM/OSC* also noted that the Petitioner has stated its willingness to reimburse Perryton Radio for the reasonable costs associated with changing to Channel 248C3 pursuant to Commission policy.⁵

3. In its comments, the Petitioner restates its present intention promptly to apply for and construct facilities on the channel that it has requested, if allotted. The Petitioner also submits its own engineering study, containing findings that are substantially similar to the staff’s engineering analysis. Specifically, the Petitioner’s study shows a net gain of 14,142 persons, a “gray” area loss of 133 persons, and a “gray” area gain of 53 persons. The Petitioner contends that, regardless of which set of figures is used, the “gray” area loss is *de minimis* when compared to the overall population gain that will result from this proposal and is within a range that has been approved by the Commission.

4. Perryton Radio opposes the Petitioner’s proposal on four grounds. First, it contends that the proposed substitution of Channel 248C3 for Station KEYE-FM’s Channel 241C3 (96.1 MHz) would financially harm Station KEYE-FM because the frequency 96.1 is an essential part of its identity and because there would likely be a dislocation of listeners. In addition, there could be listener confusion because Station KXIT-FM’s broadcasts on Channel 241C1 would likely be audible in a substantial part of Station KEYE-FM’s current listening area and the stations air similar programming. Second, Perryton Radio argues that the service improvements in the gain area for Station KEYE-FM do not offset the creation of “gray” area under the FM Allotment Priorities because the listeners in the gain area are already served by numerous radio stations. Third, it questions the ability of the Petitioner to reimburse Station KEYE-FM for its costs in changing channels, which could be significant. In support of this position, Perryton Radio submitted an affidavit from a third party, alleging that the sole owner of Radio Dalhart is currently in default on a \$182,774 debt obligation for the purchase of another radio station. Fourth, Perryton Radio notes that the Petitioner does not claim that the proposed frequency change for Station KEYE-FM is the only way to accomplish its goal of improved service and contends that the Commission should not grant the proposed channel substitution without seeking comment on alternative proposals.

5. In its reply, the Petitioner argues that the temporary disruption to a station’s listeners caused by changing channels does not outweigh the public interest benefit of providing service to additional population. The Petitioner further contends that Perryton Radio’s argument that the Petitioner does not have the ability to reimburse Station KEYE-FM for its legitimate expenses in effecting the channel change is speculative. Finally, the Petitioner states that Perryton Radio cites no precedent for the proposition that the Petitioner is required to prove that a KEYE-FM channel change is the only way for KXIT-FM to improve service. Indeed, the Petitioner alleges that the appropriate vehicle for alternative technical suggestions is through counterproposals or alternative channels, of which none was filed in this proceeding.

6. In its response to a staff request for additional information, the Petitioner submitted an affidavit from its sole shareholder, clarifying that the day after receiving a letter requesting payments of three delinquent installments on a promissory note, he made a double payment and made a third payment within two weeks. The Petitioner believes that all subsequent payments were made and are current. He further notes that the principal reason for the temporary delay in payments was due to heavy expenses incurred in constructing a new station in late 2003 and that this situation will not reoccur. The Petitioner

⁴ See *Seabrook, Huntsville, Bryan, et al., Texas*, 10 FCC Rcd 9360 (1995).

⁵ See *Circleville, Ohio*, 8 FCC 2d 159 (1967).

further states that it has liquid assets of approximately \$50,000 earmarked for reimbursing Station KEYE-FM, if necessary.

7. In reply, Radio Perryton questions the ability and willingness of the Petitioner to reimburse Station KEYE-FM for the costs in changing channels based on its history of delaying payment obligations. Because the stations are competitors, Radio Perryton believes that the Petitioner will have the opportunity and incentive to use reimbursement strategically to harm Station KEYE-FM.

8. **Discussion.** Based upon the record, we believe that the public interest would be served by the substitution of Channel 241C1 for Channel 242C1 at Dalhart and the modification of the license for Station KXIT-FM to specify operation on Channel 241C1 because there will be a net gain in service to 13,905 persons. Further, Perryton Radio has not raised a substantial or material question of fact or demonstrated that Station KEYE-FM would be harmed by modification of its license to specify operation on the alternate Class C3 channel. In this regard, we agree with the Petitioner that the temporary dislocation of listeners caused by a frequency change is not a sufficient reason for denying a rulemaking proposal where there would be public interest benefits such as improved service. Indeed, the Commission has routinely approved proposals such as the instant one.⁶ We also note that Station KEYE-FM successfully changed frequencies in 1999 from 95.9 to 96.1 MHz and that the instant frequency change is a similar move from 96.1 to 97.5 MHz.⁷

9. Next, using either the staff's engineering analysis or the Petitioner's study, we find that the creation of a "gray" loss area to either 255 or 133 persons, who would be reduced from two to one full-time aural service, does not trigger Priority (2) of the FM Allotment Priorities⁸ and is not a bar to the grant of this proposal. This population loss is *de minimis* when compared to the net gain in service to 13,905 persons.⁹ Further, contrary to Perryton Radio's assertion, the expansion of service to populations receiving five or more aural services is a factor that can be taken into account under Priority (4), other public interest matters.¹⁰

10. We also find that Perryton Radio's argument regarding the ability and willingness of the

⁶ See, e.g., *Churchville and Luray, Virginia*, Report and Order, 5 FCC Rcd 1106 (MMB 1990), *recon. denied*, 6 FCC Rcd 1313 (MMB 1991); and *Castle Rock, Colorado Springs, et al., Colorado*, 7 FCC Rcd 7668 (MMB 1992).

⁷ To mitigate the temporary dislocation of listeners, the cost of advertising promotion for the new frequency is recognized as a legitimate and prudent expense for which Perryton Radio may be reimbursed. See *Circleville, Ohio*, 8 FCC 2d at 164.

⁸ The FM allotment priorities are (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. [Co-equal weight is given to priorities (2) and (3)]. See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88, 91 (1988).

⁹ See, e.g., *Seabrook, Texas*, Memorandum Opinion and Order, 10 FCC Rcd 9360 (1995) (455 persons held to be *de minimis*); and *Wallace, Idaho and Bigfork, Montana*, Memorandum Opinion and Order, 17 FCC Rcd 2243 (MMB 2002), *rev. denied*, 19 FCC Rcd 15267 (2004) (150 persons deemed *de minimis*); *Sparta and Buckhead, Georgia*, Memorandum Opinion and Order, 16 FCC Rcd 2169 (MMB 2001) (114 persons *de minimis*); *Freer, Hebbronville, and Orange Grove, Texas*, Report and Order, 19 FCC Rcd 4742 (MB 2004) (178 persons *de minimis*). See also *El Dorado, Mason, Mertzon, and Fort Stockton, Texas*, Memorandum Opinion and Order, 22 FCC Rcd 280 (MB 2007) (124 persons *de minimis* under Priority 1). We note that, under the staff's engineering analysis, the "gray" area loss of 255 persons is mitigated by a gain in service to 98 persons in a "gray" area, for a net "gray" area loss of 157. Likewise, according to the Petitioner's engineering study, the net "gray" population loss is 74 persons. The staff's engineering study also reveals that there are some other portions of both the gain and loss areas that are "under served" (*i.e.*, have less than five aural services); however, these areas are unpopulated.

¹⁰ See, e.g., *Benton, Clarksville, Dardanelle, et al., Arkansas*, Memorandum Opinion and Order, 7 FCC Rcd 2555 (MMB 1992) (an upgrade in service to 419,348 persons favored under Priority (4) over an upgrade to 117,489 persons even though the former gain was to a population receiving five or more services).

Petitioner to reimburse Station KEYE-FM for its legitimate and prudent costs in changing channels is speculative. On the contrary, the Petitioner has shown that it cured the default on a promissory note to a third party. The Petitioner has also stated that it has earmarked \$50,000 for possible reimbursement to Station KEYE-FM and has stated its willingness to comply with the Commission's reimbursement requirements.¹¹

11. Finally, Perryton Radio has not demonstrated that the Petitioner must show alternative ways of improving service that would avoid the need for Station KEYE-FM to change channels before its rulemaking petition can be granted. We are not aware of a case in which such a requirement was imposed. Moreover, Perryton Radio had the opportunity to suggest an alternate allotment scheme or counterproposal but did not do so.

12. Channel 241C1 can be allotted at the Petitioner's specified site, which is located 34.7 kilometers southeast of Dalhart, Texas, in compliance with the Commission's minimum distance mileage separations.¹² The reference coordinates for this allotment are 35-48-23 NL and 102-17-16 WL. Channel 248C3 can be allotted at Station KEYE-FM's existing site with reference coordinates of 36-21-54 NL and 100-46-48 WL.

13. Accordingly, pursuant to the authority contained in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b), and 47 C.F.R. Sections 0.61, 0.204(b), and 0.283, IT IS ORDERED, That effective April 16, 2007, the Media Bureau's Consolidated Data Base System will reflect Channel 241C1 as the reserved assignment for Station KXIT-FM, Dalhart, Texas, in lieu of Channel 242C1 and will reflect Channel 248C3 as the reserved assignment for Station KEYE-FM, Perryton, Texas in lieu of Channel 241C3.

14. IT IS FURTHER ORDERED, That pursuant to Section 316 of the Communications Act of 1934, as amended, the licenses for Station KXIT-FM, Dalhart, Texas, and KEYE-FM, Perryton, Texas, are modified to specify operation on Channels 241C1 and 248C3, respectively, subject to the following conditions:

- (a) Within 90 days of the effective date of this *Order*, the licensees shall submit to the Commission minor change applications for construction permit (Form 301);
- (b) Upon grant of the construction permits, program tests may be conducted in accordance with Section 73.1620 of the Commission's Rules;
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

15. IT IS FURTHER ORDERED, That the petition for rule making filed by Radio Dalhart IS GRANTED.

16. IT IS FURTHER ORDERED, That a copy of this *Report and Order* be sent by Certified Mail, Return Receipt Requested, to Perryton Radio, Inc., c/o Sharon Ellzey, 715 Hawkins Way, Alexandria, Virginia 22314

¹¹ The extent of reimbursement is governed by the guidelines set forth in *Circleville, Ohio, supra*, and is generally left to the good faith negotiation of parties involved subject to Commission review in the event of disagreement. See *Churchville and Lurray, Virginia, supra*, 5 FCC Rcd at 1107 n.1.

¹² 47 C.F.R. § 73.207.

17. For further information concerning this proceeding, contact Andrew J. Rhodes, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau